Supreme Court, U. S.
FILED
MAY 17 1978
MICHAEL RODAK, JR., CLERK

No. 77-1398

In the Supreme Court of the United States

OCTOBER TERM, 1977

HERBERT FINEMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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Solicitor General,

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OPINIONS BELOW

The unpublished opinion of the court of appeals (Pet. App. C) is noted at 571 F. 2d 572. The opinion of the district court (Pet. App. A) is reported at 434 F. Supp. 197.

JURISDICTION

The judgment of the court of appeals was entered on February 1, 1978 (Pet. App. B), and a petition for rehearing was denied on March 2, 1978. The petition for a writ of certiorari was filed on March 31, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the district court properly instructed the jury with regard to the c redibility of immunized witnesses.

2. Whether the distr ct court properly instructed the jury on the intent required for the crime of obstruction of justice.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioner was convicted on two counts of obstruction of justice, in violation of 18 U.S.C. 1503. He was sentenced to two years' imprisonment and a fine of $5,000 on each count, the sentences to run concurrently. The court of appeals affirmed (Pet. App. A26-A34).

The evidence adduced at trial is set forth in the opinion of the district court (Pet. App. A3-A9). Briefly, it showed that in 1976 petitioner, then Speaker of the House of Representatives of the Pennsylvania General Assembly, became aware of a federal grand jury investigation into his alleged receipt of bribes in return for his influence in obtaining favorable action upon applications for admission to certain graduate schools of state-supported universities. The investigation had focused in particular on his having undertaken such action on behalf of Michael Braunstein, an applicant for admission to the School of Veterinary Medicine of the University of Pennsylvania. In August 1976, petitioner contacted E. Craig Sweeten, the vice-president of the university, and asked Sweeten to remove from the veterinary school's files a letter of recommendation petitioner had written for Braunstein (*id.* at A5). This incident formed the basis for Count IX of the indictment. In addition, in November and December 1976, petitioner urged Harold Salkind, a

consultant to the president of the Philadelphia College of Osteopathic Medicine, to withhold testimony from the grand jury about petitioner's contacts with him concerning applications to the college by various students (*id.* at A5-A6). These actions formed the basis for Count X.

ARGUMENT

1. Petitioner contends (Pet. 5-11) that the district court erred in not instructing the jury that the immunized testimony given by Harold Salkind should be viewed with caution or suspicion. As the court of appeals found, however, "[t]aken in its entirety, the Court's charge adequately presented that issue to the jury" (Pet. App. A32). The charge clearly pointed out the special interest or bias that a witness may have as a result of being granted immunity, since "a witness may testify under a grant of immunity out of some[1] motive to ingratiate himself with the authorities or to curry favor with them." The jury also was reminded that "this motivation may cause you to regard [an immunized witness's] testimony as unreliable" (*id.* at A32 n. 2; A37). Furthermore, petitioner testified that Salkind told him that he had to satisfy the F.B.I. by implicating "all kinds of people" because that was the only way he could get immunity (C.A. App. 1309a-1311a),[2] and petitioner's counsel stressed in his summation to the jury that the witnesses who had been granted immunity were pressured and intimidated into testifying against petitioner (C.A. App. 1461a-1462a). Hence, the jury was well aware that the testimony of an immunized witness should be viewed with caution. In these circumstances, the trial judge did not abuse his

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[1]The opinion of the court of appeals inadvertently transposes "some" to "sole." Compare Pet. App. A32 n. 2 with *id.* at A37.

[2]"C.A. App." refers to the appendix in the court of appeals.

discretion by balancing the charge with the statement that immunity may also enhance a witness's credibility by freeing him from concern that he will be prosecuted for crimes other than perjury. See *United States* v. *Abraham*, 541 F. 2d 1234, 1241 (C.A. 7), certiorari denied, 429 U.S. 1102; cf. *United States* v. *Lee*, 506 F. 2d 111, 118 (C.A. D.C.), certiorari denied, 421 U.S. 1002.[3]

Contrary to petitioner's contention (Pet. 7-8), this balanced instruction does not conflict with *United States* v. *DeLoach*, 530 F. 2d 990, 994 n.5 (C.A. D.C.), certiorari denied, 426 U.S. 909, *United States* v. *Rajewski*, 526 F. 2d 149, 160 (C.A. 7), certiorari denied, 426 U.S. 908, or *United States* v. *Demopoulos*, 506 F. 2d 1171, 1179 (C.A. 7), certiorari denied, 420 U.S. 991. Although those decisions upheld instructions warning jurors that a grant of immunity may detract from a witness's credibility, they do not suggest that it is improper to instruct the jury that immunity may also encourage a witness to be truthful. Indeed, since instructions must be tailored to the facts of each particular case, the trial judge's statements were particularly appropriate here, in light of petitioner's repeated allegations that Salkind falsely testified favorably to the government in order to obtain immunity. See *United States* v. *Abraham*, *supra*, 541 F. 2d at 1241.[4]

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[3]The judge ended his instruction by telling the jury that "it is entirely up to you how you size up that situation to decide whether or not [the immunity grant] enhances or diminishes the credibility of such a witness" (Pet. App. A32 n. 2).

[4]There is no merit to petitioner's related claim (Pet. 6) that the district court erred in commenting that it did not recall any evidence that any witness had been granted immunity in exchange for his willingness to testify in a particular way. Although petitioner testified that Salkind had stated that he was testifying to save "his own skin" (C.A. App. 1310a), there is a broad difference between truthful testimony given in order to avoid prosecution and false testimony given in exchange for immunity. Witnesses who testify under a grant of immunity frequently do so in order to avoid prosecution.

In any event, the record in this case clearly reflects that the jury's verdict was not based upon testimony given under a grant of immunity. As the district court observed (Pet. App. A12):

> [I]t should be noted that immunized testimony was not involved in Count IX (indeed, in the course of cross-examining Mr. Sweeten, defense counsel used him as a character witness for the defense), and that the testimony of Mr. Salkind in support of Count X was substantially corroborated by other, non-immunized, evidence (including, to some extent, the testimony of the defendant himself). In short, it is clear that the jury refused to convict the defendant of any charge which was based principally upon immunized testimony.

2. Petitioner contends (Pet. 11-15) that the district court failed to instruct the jury under Count IX that specific intent is an element of the crime of obstruction of justice. In support of this claim, petitioner asserts that the trial judge told the jury that it could convict petitioner even if it believed his testimony that he did not intend to convey the impression to Sweeten that he wanted the Braunstein letter of recommendation to be destroyed. Read in context, however, the instruction carried no such meaning. As the court of appeals correctly held (Pet. App. A31), the instructions clearly required a finding that petitioner specifically intended to obstruct justice by concealing the letter from the grand jury. The district court first charged the jury (C.A. App. 1529a, 1530a, 1531a):

> So that in order to convict under the obstruction-of-justice charge in each case you must be satisfied beyond a reasonable doubt that the defendant did corruptly influence or attempt to influence, obstruct, or impede the due administration of justice.
>
> * * * * *

In addition to those facts, you must be satisfied beyond a reasonable doubt that the defendant knew of the existence of the grand jury and knew that the grant jury was investigating or inquiring into matters relating to graduate-school admissions; and you must further be satisfied beyond a reasonable doubt that with that knowledge the defendant corruptly sought to interfere either with witnesses appearing before the grand jury or with information to be supplied by those witnesses.

* * * * *

Similarly, with respect to the ninth count, in order to convict under that count, you must be satisfied beyond a reasonable doubt that the defendant did request or communicate to Mr. Sweeten a request that the Braunstein letter be removed from the files with the purpose of preventing it from coming to the attention of the grand jury.

After making the statement about which petitioner complains, the court further instructed the jury (C.A. App. 1541a, 1542a-1543a):

> If you find beyond a reasonable doubt that the defendant's motive in wanting to get that letter out of the file was a corrupt motive—that is to say, that it was done in whole or in part for the purpose of preventing that letter from coming to the attention of the grand jury which the defendant then knew was investigating in that general area—then you would have a right to return a verdict of guilty.
>
> * * * * *
>
> Now, the violation charged in this case is corruptly attempting to obstruct justice by preventing the grand jury from getting information or trying to prevent the grand jury from getting information. If you find the defendant acted corruptly, the fact that he may have acted in part because he was in panic and in part a desire to protect his family would not be a defense if he acted to prevent it from coming to the grand jury.
>
> On the other hand, if he was not even thinking in terms of the grand jury, had given no thought to the grand jury, in short he did not have a state of mind which can properly be described as acting corruptly, then you would be entitled to render a verdict of not guilty. * * *

Thus, in the words of the court of appeals (Pet. App. A31), the district court's instruction, when viewed as a whole, "required a finding that [petitioner] intended to conceal the letter from the federal grand jury. Such a finding necessarily included a finding that [petitioner] intended to convey to Sweeten the impression that the letter should be removed or destroyed." The trial judge's qualifying language, far from removing the issue of specific intent from the case, merely informed the jury, correctly, that petitioner would not be absolved of liability for obstructing the grand jury even if the jury found that petitioner caused the letter to be removed or destroyed in part to avoid embarrassment to his family.[5]

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[5]Since petitioner received identical concurrent sentences on Counts IX and X and each of his claims relates only to one of the counts, the Court need not grant review if it considers either of his contentions to be meritless. See *Barnes* v. *United States*, 412 U.S. 837, 848 n. 16.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DOJ-1978-05